Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1525

RAMON RAMIREZ,

Petitioner,

versus

UNITED STATES DEPARTMENT OF
INTERIOR-BUREAU OF RECLAMATIONS, et. al.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Comes now the United States Department of Interior-Bureau of Reclamation, Respondent and files this its Brief in Opposition to the Petitioner's Petition for a Writ of Certiorari to review the Judgment rendered by the Court of Appeals for the Fifth Circuit in the above styled case.

STATEMENT OF THE CASE

The Statement of The Case in the Petition filed by Petitioners herein is substantially correct insofar as it goes, but contains no statement of facts and merely recites allegations from their Amended Complaint. Therefore, Respondent will herein set out enough of the evidence to show that the findings of fact, conclusions of law and judgment of the Court below were fully justified, if not actually compelled.

STATEMENT OF FACTS

Johnny Ramirez testified in part to the following effect: He was 10 (ten) years old at the time of trial, and was 8 years old when the accident occurred, and at that time the decedent Sam was 6; on that afternoon Johnny, Sam and 4 year old brother Pete climbed over the fence at the rear of the Salazar Housing Project where they lived with their parents, and went to the Franklin Canal and began throwing rocks in the water; Sam tried to pry loose a "stick" growing in the bank of the canal, and the "stick" broke and Sam fell into the water; then Sam went under a bridge, and Johnny saw Sam's hair and hands three times in the water and saw him no more, and went home to tell his mother, climbing the fence again to get there; (Appx. 121-131); on the way to the canal, Johnny [et al] not only had to climb the fence (D Ex. A Appx. 451) but also had to cross the railroad tracks (D Ex. B Appx. 451) to get to the area shown on D Ex. C (Appx. 452) where Johnny, Sam and Pete were playing on the canal bank; their mother and father had warned Johnny and Sam not to go near the canal, and even Pete who was 4 years old knew they were not supposed to go near the canal; just before the accident the three boys were playing policemen, and Johnny and Pete were the police, and Sam was the "guy" they were trying to catch, and Sam went over the fence to escape from the "police", and Johnny and Pete went over the fence to catch him, and then they sat down, and Johnny saw Sam go down near the canal, and Johnny again told Sam to "get away from the canal", and Sam replied that he would not fall down into the water, and then Sam tried to get the "stick" out of the ground, and the "stick" broke, and Sam fell in the canal; Sam was not trying to swim in the canal

or trying to play in the canal, and what he was after was the "stick". Johnny remembered that afternoon before they went to eat lunch, the three boys were told by a girl about 13 or 14 years old whom they knew and who lived in that area to get away from the canal, but after going home to eat their lunch the boys returned and climbed over the fence, and it was then that Sam fell into the canal and went under the water; none of the boys could swim. (Appx. 133-139). Under questioning by the Court, Johnny reiterated his testimony about the girl telling them to get away from the canal, and identified her as "Vickie", who since the accident has moved to another apartment. (Appx. 154).

James W. Kirby, Project Superintendent, Rio Grande Projects, U. S. Bureau of Reclamation, testified in part to the following effect: the fence between the Housing Project and the canal was sufficient to keep small children out; (Appx. 163); further that the fence the Ramirez boys climbed was 6 feet high and built by the City Housing Authority, and was not topped by barbed wire; the canal in question was not concrete-lined; (Appx. 186-187); the culvert or bridge belongs to the railroad and not to the Government; the Franklin Canal was originally privately owned and was built around 1880 and was acquired by the Bureau of Reclamation in 1914 and thereupon reconstructed; (Appx. 193-195); the fence over which the boys climbed equalled or exceeded the design manual requirements of the Reclamation Bureau, and based thereon, as well as Mr. Kirby's own convictions, the fence was adequate to keep out small children; (Appx. 212); the canal is operated by the U. S. Government and serves about 16,000 acres of irrigated land for the public; in 1939 the Government spent about $50,000 to fence in the canal throughout

the then section of the City of El Paso that the canal traversed, to deny access to the canal by the public; the Housing Authority of the City of El Paso owns, designed and caused to be erected the fence over which the Ramirez boys climbed, and the Housing Authority purports to maintain such fence; as the City of El Paso is now constituted, the Franklin Canal traverses 13.8 miles within the City; before the Salazar Project was constructed by the City's Housing Authority, the area was occupied by a Steel Mill and other industrial plants. Ever since 1970-1971, the Reclamation Bureau has promoted safety programs in the irrigated portions of the El Paso Valley, and more especially in every school in proximity to the canal, which would include Douglass School; (Appx. 214-225).

Enrique Bustamante testified in part to the following effect: he is Executive Director of the Housing Authority of the City of El Paso; in March of 1974 he was its Director of Development; the Salazar Housing Project was built in 1973, and previously the area was zoned "industrial", and was occupied principally by the Darbyshire Steel plant, and the zoning was changed by the City Plan Commission to permit building the Housing Project; directly behind the Salazar Housing Project were the railroad tracks, and then the canal; before the project was built, there had been a fence along Darbyshire's property line, which was taken down and replaced by a fence without barbed wire topping, because certain militant groups had complained that the Housing Authority was constructing "concentration camps" and fencing in the tenants, and the Housing Authority did not want to get involved in any "civil rights" controversies; the new fence was 6 feet high and was a chain link fence, and was designed, built on the prop-

erty line of the Project, paid for and maintained by the Housing Authority, through its architects, contractors and employees; witness had been employed by the City's Housing Authority since 1970. (Appx. 225-238).

Martha Ramirez, mother of the decedent and one of the Plaintiffs, testified in part to the following effect: their family moved into the City's Housing Project about 5 months before Sam was drowned on March 10, 1974, which was a Sunday; before lunch Mrs. Ramirez stayed on her front porch to watch over the play of some of her 8 children, and just before she started to prepare lunch she saw Sam approaching from the direction of the canal, and told him: "Darn it, you been going again at the canal"; the kids ate lunch, and she was attending their baby when Johnny came in crying, and then told her that Sam had gone to the canal; she went there but did not see Sam, and his body was found in the canal the next morning not so far from her apartment; sometimes Sam would help her around the house, but never would do exactly what she told him to do; (Appx. 247-254); on cross-examination she at first said that Sam was born on July 3, 1965, and then that he was 6 years old when he drowned in March of 1974, and then admitted that she had told the police on the police report of the accident that Sam was born on July 3, 1965, and then testified that she really did not remember when he was born; (Appx. 255); when Sam left after lunch, she gave him no further supervision or thought, but did tell him not to go to the canal, and that this occurred about 3 or 3:30 that afternoon; Sam was in the first grade at Douglass School, and was intelligent and had the understanding of a normal 6 year old boy; he was really more of a bother than a help around the home, and Mrs. Ramirez looked to her husband, and not to

Sam for her support, and never expected Sam to ever give her any support, but expected him to get married and leave home when he grew up; (Appx. 255-267); Mrs. Ramirez said that she had seen her boys playing near the canal from time to time, and for that reason had started telling them not to go over to the canal; (Appx. 269).

Plaintiff Ramon Ramirez testified in part to the following effect: that he had prohibited Sam and Johnny from going to the canal, and had reminded them "continuously at all times"; after the boys jumped over the fence, they had to cross the railroad tracks also to reach the canal; that he was not expecting Sam or any of the other children to support him, and that in this age it would be like a person who sows wheat or corn, but does not know what he would harvest; (Appx. 292-295).

REPLY TO QUESTION PRESENTED BY PETITIONERS

I.

The Trial Court's holding that the operation of the Franklin Canal was a discretionary function so as to immune the Government from its negligence was not decisive to the Judgment rendered.

Petitioners Questions Number One and Two challenge the District's Court's holding as to the operation of the Franklin Canal as a discretionary function so as to immune the Government from negligence under an exception to the Federal Tort Claims Action, 28 U.S.C.A. 2680(a). However, this holding regarding the operation of the Franklin Canal was, in fact, immaterial and not decisive to the Court's Judgment. The Petitioners fully developed their case and the District Court properly found that under the evidence Respondent was not negligent, but that the decedent and Petitioners were each contributorily negligent and such negligence was a proximate cause of the accident and damages claimed by Petitioners. This being the case Petitioners were not entitled to judgment in any event for they failed to make out a case against Respondent, and secondly their own contributory negligence was a proximate cause of the accident and damages they sought to recover for.

II.

Findings on negligence and contributory negligence barred Petitioners from a recovery.

The Trial Court found no negligence on the part of the Respondent, but did find contributory negligence

on the part of both the decedent and his parents, the Petitioners herein. Whether a particular act or omission constitutes negligence is usually a question of fact, *Blanks vs. Southland Hotel*, 149 Tex. 139, 229 SW2d 357. Any one of these findings would have supported a Judgment for Respondent.

Petitioners Questions Number Three and Four seek review of the complete record relating to whether Respondent was negligent which the Court of Appeals for the Fifth Circuit has already reviewed, and held that the Trial Court's findings were not clearly erroneous and that the Texas laws had been properly applied.

Rule 52(a), F.R.C.P. in pertinent part provides that in actions tried on the facts without a jury, the Court's findings of fact shall not be set aside unless clearly erroneous; and it is held consistently that such rule applies to Federal Tort Claims Actions; *Adams v. U.S.*, C.A. 5-1969, 411 F.2d 603; *Stone v. U.S.*, C.A. 5-1969, 408 F.2d 995; *Williams v. U.S.*, C.A. 5-1968, 405 F.2d 234; *U.S. v. Varner*, C.A. 5-1968, 400 F.2d 369.

As to the decedent child, Respondent, The Reclamation Bureau did not have the burden of making its canal "childproof"; *McClary v. Jones*, (Tex.S.Ct.-1966) 404 SW2d 213, quoting "Prosser On Torts", 1964, p. 378, Ch. 11, §59.

The general rule is that the victim of an injury occurring on the premises of another may not recover damages if he is a trespasser or licensee; *Wimberly v. Gulf Production Co.*, (Civ. App.) 274 SW 986; *Burton-Lingo Co. v. Morton*, (Civ. App.) 126 SW2d 727, affirmed 136 Tex. 263, 150 SW2d 239; *Gotcher v. Farmersville*, (Civ. App.) 139 SW2d 361, affirmed 137 Tex. 12, 151 SW2d 565; *Mack v. Houston, E.&W.T.R. Co.*, (Civ. App.) 134

SW 846; and a host of other cases cited in the footnotes to 40 Tex. Jur. 2d Rev. Part 2, §47, page 205 et seq., NEGLIGENCE.

Further, in the case of *Sorrentino vs. McNeill*, (Civ. App.) 122 SW2d 723, writ of error refused, the Texas Court of Appeals in affirming a Judgment for the Defendant held that a question of fact was raised for the trier as to the contributory negligence of a six year old child who ran into the street and was struck by a car.

Petitioner does not discuss the further finding of the Trial Court that Petitioners themselves were negligent in failing to properly supervise their child and this was a proximate cause of the accident and damages sustained by Petitioners. At the time of the accident in question, under Texas law, contributory negligence on the part of a Plaintiff was a complete bar to a recovery by a Plaintiff irrespective of the negligence of a Defendant. *Southern Pacific Company v. Ruth Matthews*, (C.A. 5 Tex) 355 F2d 924 certiorari denied, 85 S.Ct. 668.

Conclusion of law for "take nothing" judgment:

In view of the Trial Court's findings of no primary negligence on the part of the Respondent, Bureau of Reclamation, and the findings of contributory negligence on the part of both Sam Ramirez and his parents, the Petitioners, no judgment could legally have been entered other than the "take nothing" judgment entered below. The very terms of the relevant statutes required such a judgment, depending as they do for liability against the United States on a wrongful or negligent act or omission, 28 U.S.C.A. 1346, 2671-2680, and application of the local law where the injury occurred.

CONCLUSION

The Trial Court properly entered judgment that Petitioners take nothing by their suit, and the Court of Appeals properly affirmed that Judgment; two Courts having so ruled, the Supreme Court should not be called upon to again review the issue of sufficiency of the evidence and accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were duly mailed to Mr. L. Taylor Zimmerman, Suite 808, Bassett Tower, 303 Texas Avenue, El Paso, Texas 79901, on this_____day of June, 1977.

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